United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-2147

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 76-2147

VINCENT PACELLI,

Petitioner-appellant

v.

UNITED STATES OF AMERICA,

Respondent-appellant

On appeal from the United States District
Court for the Southern District of New York

REPLY BRIEF AND SUPPLEMENTAL APPENDIX FOR PETITIONER-APPELLANT

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P/S

In The

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No. 76-2147

UNITED STATES OF AMERICA,
Appellee

vs.

VINCENT PACELLI,
Appellant

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ARGUMENT

The Government's brief is a monument of obfuscation and deliberate evasion, reminiscent of its conduct of appellant's trial. Instead of facts, it hurls epithets, e.g. that appellant's allegations are "fanciful imagination and outrageous innuendo" (Gov. Br. 9) and that he "flagrantly distorted the content of the Armone record" (Gov. Br. 12). For the Court's edification, appellant includes as an appendix herein exemplary sections of the record from

Armone, Kahn, and Guante, and suggests that there has been not the slightest distortion.

1. Tape recordings and Hedge's Affidavit

The Government admits, as it must, that the tape recordings of Hedges and Kahn, the relevant part of Hedges' affidavit relating to Kahn and appellant, and the fact of Hedges' acting as an agent provocateur were not disclosed to appellant at his trial. Instead, it relies on the fact that, after being ordered not to disclose these matters to appellant, his counsel said he had no desire to use the material for impeachment anyway. (Gov. Br. 13).

Appellant's contention that he had a constitutional right to this evidence, and to consult counsel upon it, Geders v. United States, 425 U.S. 80 (1976), is dismissed as harmless error, the Government claiming that the evidence could not have helped appellant (Gov. Br. 15). As pointed out by appellant, however (Br. 11) such evidence would have shown Hedges to be a conniving schemer, a consummate liar, and completely under the control of the Government. It might have been a tactical error to use the evidence, but appellant was entitled to consider the matter, and consult counsel upon it and even to demand that it be used. It was a judgment which appellant was entitled to make. The Government's claim that the evidence, if used, would not have had a significant effect on the trial (Br. 15) is not only speculative, it is irrelevant. The constitutional rights of appellant were violated and, as in Geders, no effect whatever on the outcome of the trial need be shown. If the Government's argument were meritorious, appellant

could have been tried without counsel, without indictment and without a jury, and his inability to prove his innocence would be a bar to § 2255 relief. The Constitution is not that far gone.

The court not only forbade counsel from disclosing the evidence to appellant, the Government -- in the form of agent Dugan -- lied about the matter. Dugan falsely swore he was the "only agent" who "interviewed Mr. Hedges" (A. 4, par. 7, Tr. 414) and that he "never made a recording" of Hedges speaking about the subject matter of the case. (A. 16). Hedges compounded the cover-up by swearing that the reasons for Dugan's frequent visits was to bring Hedges' wife, whereas the truth was that Dugan was supervising Hedges' entrapment of Kahn (A. 5, par. 10). The Government seems to argue that these lies were permissible because the court and counsel knew they were lies (Gov. Br. 8 (n)). But no authority is or can be cited that Government perjury is permissible if defense counsel knows it is perjury but has been forbidden by the court from correcting it or telling the defendant about it -- which is this case.

2. Perjury concerning the sentence reduction

The Government virtually ignores the evidence on this vital issue. Both Hedges and agent Dugan incontrovertibly perjured themselves, with full Government knowledge. Hedges swore "I was offered nothing, promised nothing, and I asked for nothing" (A. 7, par. 17, TR 1070, S.A. 11*) He denied

* "S.A." refers to the Supplemental Appendix herein.

knowledge that the Government had not opposed his sentence reduction. He swore that, on his own, he told his attorney to apply for the reduction. (TR 1074). This testimony was given again and again by Hedges, as the pages of the transcript reproduced in the instant appendix attest (S.A. 1-13b).

The defense repeatedly demanded that the Government disclose its role in the sentence reduction, relying on Brady v. Maryland, 373 U.S. 83 (1963). The Government, with agent Dugan present, declined to respond (S.A. 14-27).

Hedges' repeated testimony on this point was perjurious, as the Government has not denied and cannot deny.

As disclosed in the subsequent Kahn trial by Judge McLean Judge Timbers reported that he had met with Agent Dugan, who said the Government would have no objection to a reduction of Hedges' sentence, and Judge Timbers advised Dugan to tell Hedges or his attorney to file a motion (A. 8, 24, S.A. 32-35).

Either Judge McLean lied, Judge Timbers lied, or Hedges lied. Appellant claims it was Hedges. Contrary to Hedges' sworn testimony, the idea of a sentence reduction did not originate with him; the motion was not filed simply because he told his attorney to file it. The motion was filed because the Government agreed to a reduction and advised Hedges to have his attorney file the motion. Thus, not only was Hedges' claim that the motion originated with him a lie, he clearly knew, contrary to his sworn testimony, that the Government had consented to the reduction.

Hedges' testimony that he had no conversation with

anyone in the Government about a sentence reduction (A. 7, par. 17, S.A. 11) was also perjurious. The only part of the story that is true is Hedges told his attorney to file the motion. (S.A. 13 a). Hedges did so because agent Dugan had done what Judge Timbers told him to do: advise Hedges to tell his attorney to file the motion.

Not only was Hedges' testimony perjurious, and known to be such by agent Dugan, Dugan himself lied on the stand when he swore he had not advised Hedges to seek a reduction (A. 7, par. 20, TR 3333-34).

The foregoing perjury would have been disclosed had the Government honestly responded to defense demands for disclosure of communications between Judge Timbers and the Government concerning Hedges' sentence reduction (A. 7, par. 19, S.A. 14).

Against these incontrovertible facts, the court below discussed appellant's claims with the totally irrelevant observation that "Judge Timbers...initiated it." (A. 72). The Government takes the same evasive position (Gov. Br. 9). Appellant, of course, did allege that Dugan was the architect of the sentence reduction, but that had nothing to do with the perjury. It exists, and was violative of Due Process regardless of who originated the sentence reduction.

Even if the foregoing evidence from Judge Timbers were not offered in support of the motion,** the testimony of James Godwin in United States v. Guante would alone require a hearing. Godwin testified that Hedges told him that the

** Appellant trusts that the failure of Judge McLean or Judge Timbers to swear under oath is not a barrier to reliance upon their statements.

Government promised him a sentence reduction from 15 to 5 years; a car, money and freedom if he would testify in appellant's trial (S.A. 37-39). The Government asserts, however, that Godwin's testimony was "suspect" and "uncorroborated" (Gov. Br. 10). It is hard to see how it is more "suspect" than that of Hedges, a confessed and proven perjurer, nor how it is any less corroborated. In any event, it was given under oath, subject to cross-examination by the Government, and is admissible to prove Hedges' perjury. It alone would have required a hearing. cf Taylor v. United States, 487 F. 2d 307 (2d Cir. 1973).

Nor does the Government deny that Hedges received $3,000 in cash from the Government, a fact proven in Guante (S.A. 37).

Finally, the Government has the temerity to argue that even if Hedges (and Dugan) perjured themselves, with Government knowledge, about the sentence reduction, it could not have effected the conviction, since Hedges admitted to prior perjury (Gov. Br. 11). What the Government overlooks is that Hedges paraded himself before the jury as a reformed man, a remorseful, patriotic citizen who regretted his past crimes and wished to atone for them. And it was Hedges' testimony alone, uncorroborated, which convicted appellant.

Moreover, knowing use of perjured evidence concerning consideration for testifying requires a new trial whether or not it was harmful, since such Government misconduct is offensive to Due Process. Napue v. Illinois, 360 U.S. 264 (1959); Giglio v. United States, 405 U.S. 150 (1972).

3. Suppression of Government assistance

The Government did not deny below that while Hedges was being prepared to testify against appellant, agent Dugan was visiting him weekly, recruiting him as agent provocateur against Kahn and appellant, providing him housing, helping him get a sentence reduction, nor that at some point the Government paid Hedges $3,000. Nor did the Government suggest below that any of these matters were disclosed to appellant. Its principal claim there and here is that such information "would have been of minimal value to the defense" (Gov. Br. 15). This is speculative to the point of absurdity, considering that the only evidence against appellant was from a professional criminal, confessed perjurer who paraded himself as a reformed citizen who was "offered nothing. promised nothing...asked for nothing" (S.A. 11) and "expected to get nothing" (TR 972).

4. Hedges' undisclosed involvement in a killing

The Government does not deny that at the time of appellant's trial, there were undisclosed gun charges pending against Hedges arising out of a gun battle in which Hedges shot another man. Instead, it asserts that appellant's claim that the Government was aware of these facts is "utterly without support in Pacelli's motion and the record below" (Gov. Br. 14). Yet as appears in United States v. Kahn, and United States v. Guante, Hedges, who got in the gunfight in December, 1962, while confined in the prison ward of King's County

Hospital recovering from his own gunshot wounds, was visited frequently by Dugan (Kahn, TR 195, S.A. 28-31). In fact, Hedges had been cooperating with Dugan since July, 1962, and was living in an apartment provided by Dugan (S.A. 40-41). The suggestion that the Government was unaware of the gun charges (S.A. 13) or the gun battle is utterly ludicrous.

5. Judge Bonsal's Findings

The Government claims that although Judge Bonsal failed to mention at least half of appellant's allegations he nonetheless "gave complete consideration" to them (Gov. Br. 16) and that his "decision" is entitled to great deference because he had "intimate familiarity" with the record (Gov. Br. 17). Yet Judge Bonsal's opinion supports neither assertion. On the contrary, it appears to be a boilerplate reliance on the Government's opposing "affidavit". As to the latter, it should suffice to note that it does not deny most of appellant's claims and consists essentially of legal argument. (See A.33-34). Its quality, reliability,and honesty is furthersuggested by the fact that the Assistant who filed it swore that the Kahn transcript "is unavailable" (A. 20), yet later swore that the previous opposing affidavit had been "based upon a thorough and exhaustive review of the entire record in...United States v. Frances Kahn, 65 CR 999, including four trial transcripts, exhibits and discovery material" (A. 30).

Here, as in Taylor v. United States, 487 F 2d. 307 (2d Cir. 1973). the Government's position is "disingenuous."

Here, as in Taylor, the Government has led the court below into serious error.

Appellant's petition was filed on July 24, 1975. It took the court almost fourteen months to decide that the petition was without merit on its face. Now, almost two years have elapsed since the petition was filed.

There is no evidence that Judge Bonsal understood appellant's motion, much less that he gave it careful or complete consideration. "The result of what happened here is that this Court has been burdened with an appeal that should never have had to be taken and, more important, that [appellant] has been denied an evidentiary hearing he should have had [almost two years] ago." Taylor v. United States, supra.

CONCLUSION

The judgment below should be reversed, with directions to hold a prompt evidentiary hearing before a different judge. Taylor v. United States, supra.

Vincent Pacelli, pro se

SUPPLEMENTAL APPENDIX

CONTENTS

year sentence?

A Excuse me?

MR. JACOBS: I object to the form, your Honor.

THE COURT: I will let him answer that question. In 1962 were you?

Q July of 1962, after you told Mr. Dugan that you would cooperate with him?

A Yes.

Q You were concerned about your sentence?

A No, I was not.

Q Did you ask Mr. Dugan if he could do anything about your sentence?

A Not that I recall.

Q Did Mr. Dugan indicate that he could do anything about your sentence?

A I don't recall.

Q At any time subsequent to the time that you decided to cooperate, did you ask Mr. Dugan or anybody connected with the United States Government to assist you in the reduction of your sentence?

A No.

Q Not even the judge?

A My attorney filed -- excuse me, I wrote a letter from Lewisburg Penitentiary to the judge asking --

Q When?

A This was a prisoner's suggestion that I write a letter.

Q When did you write a letter?

A I am thinking about the letter.

Q Think to yourself.

A It was in 1961, I was in reception, A & O, and I wrote the letter, which would have been around March or April of 1961, April of 1961, yes.

Q Subsequent to July of 1962, after you agreed to cooperate, did you ask anybody connected with the United States Government to do anything for you in regard to your 15-year sentence?

A No.

Q Did anybody connected with the United States Government offer to do anything for you in regard to your 15-year sentence subsequent to your decision to cooperate in July of 1962, in exchange for your cooperation?

A No, I don't recall any offers or any promises, whatever you are trying to get at, Mr. Krieger.

Q I am trying to get at the truth.

THE COURT: The question is whether you asked anyone?

THE WITNESS: No, I did not.

Q Did anybody from the government make any offers to you in exchange for your cooperation?

A No. As I recall, as best I can, no one offered.

Q That they would bring your cooperation to the attention of Judge Timbers in an application for a reduction of sentence?

A I don't recall that. It is possible, it may have happened, I don't recall it.

Q Did Mr. Dugan or someone else say to you that in the event that you cooperate, fully, completely, one hundred per cent, words to that effect, that while we are not making any promises to you, we will bring the fact of your cooperation to the attention of the judge? Anybody say that to you?

A I don't recall honestly, Mr. Krieger.

Q Are you denying that it occurred?

MR. JACOBS: Objection, he answered it, your Honor. He says he doesn't recall it happening.

THE COURT: He doesn't recall. The question is could it have happened?

THE WITNESS: It is possible it could have.

THE COURT: And you don't recall? All right.

Q You don't recall, but it could have happened?

A To give you room, Mr. Krieger, I believe it is possible, it could have happened. I don't know if it did but -- I don't recall it, but it is possible it could have happened, yes.

Q In July of 1962, prior to your coming out on bail pending appeal, do you recall whether you talked with Mr. Dugan about this general subject of your getting some assistance from the government if you cooperated, in regard to your sentence?

A Before I come out on bail, you are speaking of?

Q Yes.

A No, I don't believe I spoke of any reduction in sentence or any promises or what could be done. I asked nothing.

Q You asked for nothing?

A No.

Q And nothing was offered to you?

A As best I can recall, nothing has been offered to me.

Q At this time?

A At this time, or --

Q Or ever after?

A That is true.

Q Now, did there come a time when an application for a reduction of sentence was filed?

A Yes.

Q Do you remember when that was?

A It was in 1963.

Q About when?

A If you will give me a moment.

Q Surely.

A It was in the limits after my appeal was over, in the legal limits for me to apply for reduction of sentence, which is in the 60-day limit legally after the decision of my appeal was heard and affirmed. I then spoke with my lawyer Frances Kahn and decided to file, which was better than going to the Supreme Court, because I felt I had no chance of winning and she felt I had no chance of winning and filed a reduction of sentence, and fortunately it was granted.

Q You filed a reduction of sentence. Now, do you know how that was done, how it was filed?

A No, I am not a lawyer, Mr. Krieger.

Q You were telling me about the 60day limit and certiorari and you seem to know what was going on.

A A little very little.

Q Do you know how the application for reduction of sentence is filed?

A To be honest --

Q Yes.

A No, I don't. I really don't know. I know I have heard within 60 days after appeal to file this, but if I filed it myself, I don't think I am capable of filing it.

that this affidavit is based on information given to Miss Kahn according to Mr. Hodges. The affidavit according to Mr. Hodges' testimony here is as phony as a $3 bill.

THE COURT: But that doesn't mean, assuming it is true --

MR. KRINCAR: If he authorized it in discussions with her on February 15th, in effect, your Honor, he was deliberately committing an act of perjury as late as July of 1962 when there is no reason for him to lie.

THE COURT: On the present state of the record I will sustain the objection to it.

(The following took place in open court.)

MR. KRINCAR: Your Honor, it is five minutes to 3. May we take our mid-afternoon break?

THE COURT: Yes, we will have our mid-afternoon recess, ladies and gentlemen.

(Recess)

THE COURT: You may proceed, Mr. Krieger.

BY MR. KRINCAR:

Q Mr. Hodges, do you recall telling us yesterday, I [illegible] had in fact now as that you did not [illegible] did the [illegible] prohibition.

that in or about April of 1963 you instructed your attorney to file an application for reduction of sentence. Do you remember so testifying?

A Yes, I do.

Q Do you remember you told us yesterday that there was only 60 days after the appeal had been -- after your conviction had been affirmed in which to make the application for the reduction of sentence?

A I believe that is the legal period, yes.

Q That is why you asked your attorney, is it not so, to make the application for reduction of sentence at that time?

A My attorney suggested going to the Supreme Court might be effortless --

THE COURT: I don't think that is the question. Let us not get into that. The question is did you instruct your attorney or the attorney advise you that in view of this 60-day period this would be the time to make an application?

THE WITNESS: Yes, I asked my attorney to file it.

Q [illegible] the 60-day period expired any application [illegible] would [illegible] make

of time, paper and energy?

A I had heard that.

Q Isn't that so?

A I don't know for certain. I had heard that.

Q So you contacted Miss Kahn and told her to make the application?

A I don't know if I contacted Miss Kahn. I believe she came to see me and I asked her to file the application.

Q You had been seeing Mr. Dugan at this period of time, hadn't you, in or about April, 1963?

A Yes, I believe I had, yes.

Q Seeing him with regularity, averaging it out over the month?

A A certain amount of regularity.

Q At least once a week, right?

A Approximately, yes.

Q Whether you were taken out on a writ or he came up to visit you it was at least once a week?

A Approximately, yes.

Q Did you discuss at all this matter of reduction of sentence with Mr. Dugan?

A I don't recall. I may have told Mr. Dugan I instructed Miss Hahn to file a petition for reduction of bond, I don't recall really. I may have, I don't know.

Q Now, up to this time, in or about April, 1963, in your conferences or discussions with Mr. Dugan, had the question come up and answer this yes or no please, had the question come up of your being a witness?

A Will you repeat that, please?

(Question read)

A In April of --

Q And at that time when you were drawing these notes you did speak with Mr. Dugan?

A Yes, I did.

Q Did you have a discussion about your sentence at that time?

A I don't recall having any discussion about my sentence with Mr. Dugan.

Q Tell me, did you then tell him before your sentence was reduced to speak to anyone connected with the Federal government about a reduction of your sentence?

A No, I don't believe so, no.

Q Did anyone tell you, sir, before your sentence was reduced that the Bureau of Narcotics was going to recommend a reduction of your sentence?

A I repeat, Mr. Lewis, I was offered nothing, promised nothing, and I asked nothing.

Q Did anyone tell you, whether Mr. Dugan or anyone else, that there was a memorandum in the New York office to the effect that the Bureau of Narcotics would go along with a reduction of your sentence?

A He did not.

Q Tell me, [illegible] receiving any compensation for testifying [illegible] when I speak of compensation.

I mean monetary compensation.

A What is monetary compensation?

Q Money.

A Money, no.

Q Is any member of your family receiving any?

A No one is receiving any money, Mr. Lewis.

Q Just for the purpose of the record?

A For the record, no one is receiving, I am not, nor any member of my family is receiving any money for this case or any other case or anything you are speaking of.

Q Have you been promised any money?

A I have not been promised --

Q Let me finish.

THE COURT: Wait until Mr. Lewis finishes his question.

Q Have you been promised any money, that at the conclusion of this case you will receive any money?

A No, I have not been promised at the conclusion of this case I would receive any money.

Q Tell me, before your sentence was refused did Mrs. Klein tell you that she had been advised that the government was not going to file an opposing affidavit to your [illegible]

13

A I don't recall Mrs. Kahn telling me anything like that, no.

Q Don't you know, sir, as a matter of fact, that the government did not oppose a reduction of your sentence?

A No, I do not, no.

MR. LEWIS: Will the government stipulate at this time that they did not oppose the reduction of sentence?

MR. JACOBS: The government will not so stipulate.

MR. LEWIS: I call upon the government to produce any opposing affidavit that they have.

THE COURT: Let us move on, Mr. Lewis. You are cross-examining Mr. Hodgen at this point and he testifies he does not know.

THE WITNESS: I do not know.

THE COURT: He does not know.

Q Now, before this application for reduction was made you had conferences with Mrs. Kahn, is it not correct?

A Yes, I did.

Q [illegible] on those occasions?

A [illegible]

A After the appeal --

Q Did you discuss with her at these conferences?

A When do you mean? I don't know when you mean. I have had many discussions with Miss Kahn -- Mrs. Kahn.

Q Mrs. Kahn. Before Mrs. Kahn filed the application, that is, about in April of '62?

A Yes.

Q She had conferences with you in relation to the application for reduction? Right?

A After my appeal, yes.

MR.JONES: I believe it is April of '63.

MR. JONES: April of '63.

THE WITNESS: April, '63, yes.

Q At those conferences did you discuss with her the making of an application to reduce your sentence?

A After my appeal I am saying -- I am trying to explain after it was affirmed, after she came and saw me afterward, the appeal was over and affirmed, she discussed, she said, "Well, do you want to go to the Supreme Court?"

Q You did know about the Supreme Court.

A When it was, they put in for reduction of sentence.

Q I didn't ask you. All I asked you, did you discuss with her the application to reduce your sentence?

A After the appeal, yes. You are speaking of a number of times.

THE COURT: This is after the appeal and during the 60-day period, Mr. Leale is asking you, did you discuss it?

THE WITNESS: Yes.

Q Did you discuss with Mrs. Kahn the making of an application to reduce your sentence?

A Yes, I told her to file an application for reduction of sentence being that she had not taken it to the Supreme Court.

Q You can't get away from that Supreme Court now?

THE COURT: Well, never mind.

MR. LEALE: All right, Judge.

Q At those conferences that you had with her when you told her to make the application, did you discuss the substance of the affidavit, what is going to be in the affidavit?

A [illegible] I said yes. Judy had a [illegible] regarding what

MR. KASANOF: If your Honor please, this application is addressed in connection with the testimony of the government's first witness, Charles Hedges.

Mr. Hodges testified and was examined and cross-examined about the fact that he originally had been sentenced in a related criminal case to a sentence of 15 years and that subsequently it had been cut to 5 years. Mr. Hedges said that he aside from instructing his attorney, took no part in the application and motion, that he was unaware of any action on the part of the government.

U.S.M. Armore

We now ask the government to produce and inform us whether or not the United States Attorney in this district or in Connecticut or the Bureau of Narcotics made representations directly or indirectly to the District Court or to the United States Attorney in Connecticut, in regard to the cutting of Mr. Hedges' sentence.

We think this material should be produced and available tous.

THE COURT: What do you relate this to, the credibility of Mr. Hedges? What is your purpose, why do you want this material?

MR. KASAHOF: Well, I want to show first his motive for testifying here in chief. I want to, second, to show his credibility insofar as his statements on the witness stand relating to his version or account of how this sentence was cut. He says, and I am quoting him, that an application was made and "fortunately it was granted."

If the government has within its possession something that shows this cut was other than fortunate but the result of representations, directly or indirectly by a government officer, that the government either did not oppose or favored the cut of that sentence, for the government to sit back and permit its principal witness to cast such impression before this jury goes beyond the question of motive, goes beyond the question of credibility and goes to the question of fundamental fairness in federal criminal trials.

There are innumerable cases and there is a New York State case which I think is exactly in point almost to the letter where a witness testified that no promise had been made. But after conviction it developed though no promise had been made the government or in that case the People of the state had informed the court, had given an expression of its views. And I don't want to be in the position to wait until

a late date for my request. I am making it promptly at the close of this witness' testimony. I think it is appropriate and I ask the government to do that and that is the first request.

The second request is that I ask your Honor to direct them to do that if they are unwilling to do it voluntarily.

THE COURT: Mr. Jacobs, what do you say?

MR. JACOBS: First, your Honor, Mr. Hedges didn't say that the government did or did not do anything. He said he had no knowledge of what the government did.

Secondly, your Honor, I was informed some weeks ago Mr. Kasanof spoke to Mr. Mankel, an Assistant United States Attorney in Connecticut about this very matter. Your Honor, the defendants go out and speak to a former Assistant United States Attorney about what he did in this particular matter and now they come around and call on the government to make a representation and I think if they wish, the burden is on the defendants to serve subpoenas on any people they feel they might have and go out and put these people on the witness stand.

The government, if there is anything in writing,

your Honor, the court files are available to the defendants. There are no secret files of the government. If anything was filed with the judge--

THE COURT: The files of the proceedings in connection with the reduction of sentence would be made available to you gentlemen?

MR. JACOBS: The files, they have the complete files.

MR. KRIEGER: If your Honor please, nothing has been made available to us. What we did and in our proper preparation of the case was to go to New Haven and carefully go through the court file of the Cianchetti case. In the file there was a notation, handwritten on a torn piece of paper which said and I think I am quoting it exactly, "Mr. Markel is aware of this."

In its position in the file it was quite close to the application for resentence. On another day Mr. Kasanof and I went up to see Mr. Markel. Mr. Markel said that his recollection of what transpired was at best almost a total blank, that the matter was "a Southern District matter"; that he had nothing to do with the application for resentence as far as he could recall and that he felt that he would have to interpose the executive privilege to any further discussion

concerning the matters.

Now, to say that we can just put a man on the witness stand is ridiculous. We have gone so far and this was something we intended to call to your Honor's attention previously but what with one thing and another we just happened to neglect it. We have gone as far as contacting Judge Timbers' law clerk concerning an appointment to speak with his Honor about this circumstance and so far no appointment has been made.

But all these and other matters are things which perhaps we can uncover. This still does not answer the problem before the court as stated by Mr. Kasanof. If the government has information which shows the bias of the witness or the motive of the witness, under every concept of fundamental fairness this jury should not be allowed to come to a different conclusion or be given a different impression by this witness while Mr. Jacobs just sits by.

We don't know if such a thing exists but I believe we have the right to ask for its production. I don't think the answer is that we went up and did some investigative work.

MR. KASANOF: May I just add one thing

factually which I think may be illuminating and that is that we find a rather strange thing in regard to the file. That is that there are papers which I think your Honor has seen, referred to here and marked for identification, drawn by the attorney for the witness and submitted in the District Court in Connecticut. It is the written motion papers. There is no written reply paper in those files.

THE COURT: Do you mean on the motion for reduction?

MR. NASANOW: On a motion to reduce sentence there is no written reply, no government affidavit. So that we are now in the position of assuming something I think is unusual for litigation, criminal litigation in these courts, that the government made no written reply to a motion to reduce sentence. There is apparently nothing on the trial docket or in the file papers which were available to us to indicate any position.

We went further. We went to the court reporter, the judge who sat, and asked him if there were any minutes of proceedings for the days intervening between the day when the motion was made and the order was entered. He checked his diary and log and found no reports of minutes of proceedings.

We are not asking the government to ease our burden with regard to something which we may with diligence discover. We are asking them to disclose to us something out of the ordinary course of litigation apparently that may have taken place. We don't know.

If the United States Attorney will represent to us that no communication was had, that is one thing. We are blocked by executive privilege on the part of

the Assistant. There is no further method that we can pursue. I don't know if Mr. Jacobs would be responsive to a subpoena if all of the United States Attorneys files are here. I can see no other way in which we can find out what I think we are in fairness entitled to know.

THE COURT: I think your point is, gentlemen, that a man serving a 15-year sentence that is suddenly reduced to 5, you say, well, there must be a reason for that. That does not happen every day in the week. That is what your point is, and, of course, there is something to that. On the other hand, I am not clear as to any obligation on the part of the government to produce any documents, other than what are in the files.

Offhand, that is rather difficult. I think the proposition may speak for itself. But if you gentlemen can suggest any authorities or any law under which the government is required to produce anything they may have which is not in the court record, I will consider it.

MR. KRIEGER: My recollection leads me to Brady v. Maryland.

THE COURT: Maybe it does. I don't know.

MR. KRIEGER: Brady v. Maryland was decided, I think, in 1963 by the United States Supreme Court, and in that case the prosecuting authority neglected or didn't even neglect, just didn't turn over, and there was no motive of deliberateness on the part of the prosecuting authority, he just didn't turn over a confession.

THE COURT: I think that is rather different than the kind of thing we are talking about.

MR. KRIEGER: I think it is the same thing, your Honor, because it is evidence which can tend to exculpate the defendant. This was the confession of another person, as I recall. Now, motive to testify or bias against the defendant is certainly capital evidence. This is prime evidence. We can even introduce extrinsic evidence in the course of cross-examination or extrinsic evidence in our defense to show motive or bias. Now, if the government has it and it exists we are entitled to it.

THE COURT: The only thing I don't follow, this is not something that Mr. Hedges did. If anything was done and it was not communicated to Mr. Hedges, how could he have a motive at this time?

MR. KRIEGER: I don't think we are bound by

his answer that it was not communicated.

THE COURT: The point to that, and it seems the proposition speaks for itself, that a witness who is serving a long sentence and who reaches a point where he decides he will cooperate and his sentence is reduced, that that may have a bearing on his desire to cooperate. It canhave. I don't know how strong, but I think it can have a bearing.

MR. JACOBS: I don't know if your Honor is familiar with the motion that the defense attorney made for reduction of bail, but in the papers it states upon information and belief the defendant has to the best of his ability fully cooperated with the United States law enforcement agencies in this investigation of certain alleged individuals in respect to the crime of conspiracy. In addition, your Honor, there is a statement in here as to the shooting of the witness. This is not information that the United States Attorney gave the judge. This is all information that was given by the defense attorney.

MR. KRIEGER: Which is all the more reason for the judge not granting the application unless there was confirmation of this. If he was a serious enough defendant for Judge Timbers to impose a 15-year

sentence, Judge Timbers would not reduce it to by 10 years merely on an affidavit from Mrs. Kahn. This sentence was reduced long prior to the testimony here and the 60 days does not cut much ice. If the government was interested in rewarding him subsequent to his testimony, if it was just a matter of holding back, "We will see what will happen come the future," they could seek executive privilege. This was a bargain struck. That is what the record seems to state.

THE COURT: I think that is quite a conclusion. I would not say that. I will tell you what I will do. I don't see that Brady v. Maryland bears on this point, but if you wish to brief this motion and have Mr. Jacobs answer it, I will consider it. I can see the importance from your point of view. I don't doubt that for a minute. And I will certainly consider any authorities you have to present and Mr. Jacobs has to present.

MR. LEWIS: May I ask you a question, Judge? If there is an inter-office memorandum, whether it comes from Washington, whether it comes from Connecticut to New York, if it is in the files of the Bureau of Narcotics that will recommend that Judge Timbers

be advised that this man Hedges is cooperating with the government and that he give him the maximum benefit on a reduction, under those circumstances should we not be permitted to have that and bring it to this jury's attention?

MR. JACOBS: If it was communicated.

MR. LEWIS: What difference does it make? There might be something in the memorandum that they had spoken to this man. You must realize, Judge, he had almost daily conferences with narcotic agent Dugan. Certainly, this jury would have the right even if it did not appear that it was communicated to him, the right to draw the inference that he knew about it and that he was not going in because he was conscience stricken, and the fact that he got a 10-year reduction didn't make a particle of difference to him. Now, I think, if your Honor please, we look at the Massina case --

THE COURT: The problem, Mr. Lewis, is not quite as black and white as you make it here. You are jumping over two hurdles, one is that the government in some way or other got the judge to reduce the sentence, and, two, they got the witness to lie.

MR. LEWIS: I didn't say that, Judge. No,

a witness can lie, but I am not accusing the government of any complicity or duplicity in this case. I say if the government has an inter-office memorandum, the Bureau of Narcotics files, that they are duty-bound to turn it over to us and the jury has the right to be apprised of the fact that the government went to bat for this man. The fact that they did go to bat for him does not mean that the government is entering into any deals for perjured testimony.

THE COURT: I think that is correct.

MR. LEWIS: I don't say that. But they have a right to bring it out because the government should not hide something like this. This is too

c2 important.

THE COURT: I don't think the jury really has probably great difficulty with this problem, but, as I said, I will let you brief it, gentlemen, and bring it to my attention and let Mr. Jacobs answer it.

MR. KRINSER: We can save a lot of time briefing it if the government would indicate whether such papers exist.

THE COURT: I am not prepared to direct them on the present state of the record.

MR. KASANOF: Are they prepared to voluntarily do that?

THE COURT: They can always think that one over.

Why don't you do this, gentlemen, and I will entertain it.

Any other applications, if not, we will adjourn until tomorrow morning. x x x

(Whereupon, an adjournment was taken to May 18, 1965, at 10 A.M.)

A Yes.

Q Could you describe where these offices are in the jail?

A Well, they are right by the switchboard as you come in the second door of the jail.

Q Now, Mr. Hedges, did there come a time when some electronic devices were placed into these rooms?

MR. ROGGE: If your Honor please, if he knows.

THE COURT: I assume that is what you mean.

Q That you saw.

THE COURT: Did you see them?

THE WITNESS: Yes, sir.

Q And do you recall when for the first time electronic devices were placed in either one of these rooms?

A In the beginning of September Tom Dugan and another agent by the name of Durham came up with the recording equipment and installed the recording equipment on my person and on the desk, I believe, underneath the desk.

Q Now, Mr. Hedges, you said this was at the

beginning of September. Was that prior to or subsequent to the affidavit that you signed?

A That was after the affidavit that I signed.

Q I show you this affidavit and ask you what date did you sign this affidavit?

A It's on the 20th of September, 1963.

Q Do you still think it was the beginning of September when they came up with this equipment?

A Excuse me. The beginning of October it was.

Q Could you describe the equipment as best you recall it?

A Yes. One receiver -- I guess it is a receiver. I don't know actually what it is. Where the voice goes through in place of tape, was about as big as, well, it was actually about that big and about that high. It looked like a small pack of cigarettes.

Q About two inches by four inches?

A Approximately, yes.

Q Where was that placed?

A Where was that placed?

Q Yes.

A On me.

Q Where on you?

A It was placed on my groin.

Q How did you attach it?

A With adhesive tape.

Q And the other receiver you spoke about?

A That was placed under the desk and I can't give a good description of that because I don't remember actually.

Q Could you tell us about how big it was?

A Well, at the moment, I can't, because I don't know because Mr. Durham was installing that and I didn't get an opportunity to see that much of it.

Q Was the same equipment used the following year in 1964?

A As far as I was concerned with the box, the little box that I had on my person, yes, that equipment was used.

THE COURT: In what room was the desk on which this device was placed?

THE WITNESS: It was in the sheriff's office in the Westchester County Jail. Excuse me. Your Honor, it was on my person, so if we were in the Sheriff's office at Westchester County Jail --

THE COURT: You told me a device was placed on a desk.

THE WITNESS: Oh, that was in the sheriff's office.

Q Where, on or under the desk, was it placed?

A I believe it was under a drawer, if I am not mistaken. It was under the desk somewhere.

Q Do you know if this device that was under the desk was employed again in 1964?

A I don't know. No.

MR. JACOBS: I have no further questions.

CROSS-EXAMINATION BY MR. ROGGE:

Q Mr. Witness, there is a gun charge pending against you now, isn't there?

A That's right.

MR. JACOBS: Objection, your Honor. I don't see what relevancy that has to this proceeding.

THE COURT: Overruled.

Q And you consulted Miss Kahn about that charge, didn't you?

A No, I didn't consult Miss Kahn on that charge at all. We spoke of it but it was not a consultation, Counsel.

********** [illegible]

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32-E

COLLCQUY

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[R] 1410

UNITED STATES OF AMERICA
vs
FRANCES KAHN, VINCENT PACELLI
and ISRAEL SCHAWARTZBERG

New York, March 7, 1966
10. a.m.

(1)

(Trial resumed.)

START - -

(In the robing room)

THE COURT: Gentlemen, I wanted to tell you that last Saturday evening, I think it was March 5th, I telephoned Judge Timbers at his home in Darien where he was for the weekend and discussed with him the subpoena which Mr. Schawartzberg had served upon him.

Kahn

Judge Timbers told me that he is in Syracuse where he is sitting by assignment of the Chief Judge of the circuit, that he is trying the case of U.S. against Gorea, which is a criminal case, income tax evasion, that the case is supposed to last three or four weeks, that he began it last week, and in order to expedite matters as much as possible last week he sat to 6 p.m. and on one day 7.30 p.m.

There are many witnesses and this apparently is considered by the Government up there in Syracuse to be a very important criminal case. He said it would

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seriously disrupt the business of his court if he had to take a day off, at least a day would be required to journey down here to testify.

He said he would do so if I asked him to, but he felt very strongly that it would be disruptive to the due handling of that case in Syracuse.

I then asked him what he would testify to if he came and I explained to him that I had understood from Mr. Schawartzberg that Mr.Schawartzberg wished to inquire into, in substance, the circumstances surrounding the reduction of Hedges' bail and subsequent reduction of Hedges' sentence.

Judge Timbers had the following to say:

He said in the first place, he didn't have any documents of the nature referred to in the subpoena which I take it called for the production of diaries and records and so forth. He has no diaries, he has no records other than the regular court records on file in Connecticut.

He said that he had no recollection of the circumstances with respect to the reduction of bail in 1962. He said that with respect to the reduction of sentence in 1963, he had a clear recollection. He said that this came about on his

initiative. He said that after the conviction of Hedges was affirmed and the conviction of the others was reversed, it seemed to him that in fairness some reduction should be made in Hedges' sentence since Hedges was at that point the only one who had been convicted and who had a sentence facing him.

He said he spoke to the then United States Attorney in Connecticut, a Mr. Markel, who was not, apparently, the United States Attorney who had tried the Hedges case and who had no personal knowledge of the situation, and asked Mr. Markel to find out whether the Government would have any objection to a reduction of Hedges' sentence.

As a result of that inquiry, Mr. Markel brought Mr. Dugan in to see Judge Timbers. Judge Timbers said that he asked Mr. Dugan whether the Government would have any objection to a reduction of Hedges' sentence and Mr. Dugan said it would not.

Mr. Dugan, according to Judge Timbers, didn't make this request. The initiative came from Judge Timbers himself.

Judge Timbers said that he advised Mr. Dugan that he thought a formal motion should be made by Hedges for this relief and it is his best

COLLOQUY (4)

recollection that he asked Mr. Dugan to communicate with Hedges' attorney to that effect, or with Hedges himself.

Thereafter, Miss Kahn made the motion, as we all know, and Judge Timbers reduced the sentence.

I think that covers what Judge Timbers told me. He also said that when the motion was made, no opposition papers were filed. There was no argument or hearing on the motion. His action in granting it was, according to his recollection, merely by an endorsement on the papers without any opinion.

I told Judge Timbers, and I will state here, that in view of these facts, it does not seem to me that anything Judge Timbers could testify to in this matter would be of any assistance whatever to Mr. Schawartzberg and under those circumstances I will not interrupt the due administration of judicial business in the Northern District of New York by requiring Judge Timbers to come here. I therefore quash the subpoena for that reason.

I am not ruling on the question of privilege or on the relevance of any testimony that Mr. Schawartzberg may seek to elicit from Mr.Dugan. He is free to call Mr. Dugan, if he wishes.

A No, but I was promised money.

Q How much were you promised?

A $5,000.

Q When were you promised the $5,000?

A Before the last trial.

Q From a narcotics agent?

A Well, it wasn't a promise. They just don't make promises. They say "We can't use the word promise, but don't worry about it. You will get the 5,000."

Just like they told me, "Don't worry about it, you will get out of prison," and they kept their word. I got out of prison.

MR. LEISURE: Objection.

THE COURT: Sum up later. Put your questions now.

Q Did you receive any money from the government?

A Yes, I did.

Q How much money?

A $1500.

Q Do you know of your own knowledge whether Hedges received any money?

A Yes, I do.

Q How much money did he receive?

A 3,000.

Q Do you know whether Hedges made any demand for money?

A No, he didn't want no money.

Q With respect to Hedges' sentence, do you know whether he ever made a demand that it be reduced or that the government agents help him in any way?

A They told him they would, they would get his sentence reduced from 15 years to five years.

Q Did you hear him say that?

A No. Charlie told me, my cousin told me. They did it. I mean, it was cut, so why shouldn't I believe it?

Q Did he tell you that he asked them to do it?

A They told him they would do it.

Q Did he tell you that they asked -- that he asked them to do it?

A I don't remember that.

Q Did any of the narcotics agents

promise you that they would go before your board and get you out if you testified?

A Yes, they did.

Q Is that the reason you testified?

A Well, like I said, they didn't promise. They said "Don't worry about it, it will be done."

They did it and I got out.

Q Did you feel that this was a promise when they were telling you?

A Well, I mean, what's a promise?

MR. LEISURE: Objection, your Honor.

THE COURT: Sustained.

Q Do you know whether they told Hedges anything along those lines about sentence?

A Well, when the case started and when Charlie was in New Haven, Connecticut, in the county jail up there, the agents did come and tell him that they would get him out, they would give him money, they would give him a car, they would give him anything that he wanted if he would testify in the case.

lhr Godwin-direct

Q Hodges said that?

A Yes.

Q Do you know Dominick Romano?

A I can't see here.

Q Stand up.

A No, I don't know a Dominick Romano.

Q Do you know any of the other defendants here?

A Yes, I do.

Q Who?

A I know Frank and I know the other fellow, Allie.

Q By Frank you mean Frank Shebibi?

A Yes, sir.

Q And Allie, you mean Allie Romano?

A Yes, sir.

Q You can sit down now.

But you have never met Dominick Romano before?

A No, sir.

Q Or seen him before?

A No, sir.

Q Did you ever have a conversation with Hodges in the Westchester County Jail that he

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THE COURT: Did this incident, the incident which you just described when he was shot, take place after he had started to cooperate with the government?

THE WITNESS: Yes, while he was cooperating. Everybody knew that he was cooperating because --

MR. LA ROSSA: Objection.

MR. FRIEDMAN: Objection.

MR. HANRAHAN: Objection.

MR. LA ROSSA: How can a statement like that go into the record?

THE COURT: Overruled. I want to get the story. I am not worrying about technical events now. Go on.

THE WITNESS: In August of 1962 he made bail, $25,000, and he was released on bail pending his appeal. He had been in prison serving his sentence prior to that time.

MR. LA ROSSA: I can't hear the witness.

THE WITNESS: He had been in prison prior to that time serving his sentence. August of '62 he was released on bail. I got him

41

an apartment up on 82nd Street --

THE COURT: Before his sentence was over, I take it, he was released on bail?

THE WITNESS: Yes, pending appeal. From August of 1962 to December when he was shot I was conferring with him at the apartment and in other areas about this case. Prior to that time, prior to August, while he was up in Westchester County jail, I was conferring with him.

When he had been sent to Westchester County jail -- I am sorry, your Honor. The Westchester County jail came after the shooting.

They were well aware that he was cooperating, and in one instance Jimmie Godwin was at a bar and a man told him to keep away from Hedges because he was going to be shot.

I was trying to persuade Hedges to move from that apartment at the time of the shooting. These two people are very emotional, they are seeing shadows everywhere, particularly since this trial started.

THE COURT: Have you tried any other way to get him away?

THE WITNESS: Yes, your Honor.